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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/633,561	08/05/2003	Paul Benjamin Abernathy	P07918US00/MP	7137
881	7590	03/28/2006	EXAMINER	
STITES & HARBISON PLLC 1199 NORTH FAIRFAX STREET SUITE 900 ALEXANDRIA, VA 22314			ELKINS, GARY E	
			ART UNIT	PAPER NUMBER
			3727	

DATE MAILED: 03/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.		Applicant(s)	
	10/633,561		ABERNATHY, PAUL BENJAMIN	
	Examiner		Art Unit	
	Gary E. Elkins		3727	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 December 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. Claims 1-13 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The newly presented limitation that the opening has an area of at least 30 percent of the side of the container with the opening is new matter. The specification is silent with respect to the proportions of the opening area relative to the sidewall area. The claimed range of at least 30 percent was not originally disclosed in this application nor is the range supported by the drawings.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Flood. Flood discloses all structure of the claimed container except an opening having an area at least 30 percent of the side of the container and, with respect to claim 3, formation of the openable line with a downward convex shape. It would have been obvious to make the size of the container such that the opening is at least 30 percent of the side in Flood as a mere change in the area of the side of the container. Sizing of a container to hold a given desired amount of content is

Art Unit: 3727

within the level of skill in this art. It is noted that the side opening in Flood is sized to allow one to remove the food packages such as small quantities of cakes, crackers etc. therefrom (see page 2, lines 27-36). The relative proportion of the opening to the side of the container is not seen to provide any distinguishing function with respect to the size of the opening, but rather appears to relate to the size of the container per se. With respect to claim 3, it would have been obvious to make the opening line in Flood with a downward convex shape as a mere arbitrary change in the shape or appearance of the opening line. No functional distinction is seen nor has any functional distinction been made by Applicant between the claimed opening line shape and that shown in Flood. Design patents are available to patent differences based solely on appearance.

4. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Flood as applied to claim 1 above, and further in view of either Lozaun or Hurray et al. Modified Flood evidences all structure of the claimed container except structures defining potential handle openings in opposing sides of the container. Each of Lozaun and Hurray et al teaches that it is known to make a box with potential opposing handle openings (28; 125, 126, respectively) to facilitate carrying the container. It would have been obvious to form opposing potential handle openings in the container in Flood as taught by either Lozaun or Hurray et al to facilitate carrying of the container. Handle openings in the sidewalls of boxes are well known in this art.

5. Claims 9 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over either Tiefry or Deger. Each of Tiefry and Deger discloses all structure of the claimed container except an opening having an area at least 30 percent of the side of the container and, with respect to claim 12, formation of the openable line with a downward convex shape. It would have been obvious to make the size of the container such that the opening is at least 30 percent of the side

Art Unit: 3727

in either Tiefry or Deger as a mere change in the area of the side of the container. Sizing of a container to hold a given desired amount of content is within the level of skill in this art. It is noted that the side opening in each of Tiefry and Deger is sized to allow one to remove the contents through the side opening and both are believed to be sized such that a person's hand and wrist could be inserted therein, if so desired. The relative proportion of the opening to the side of the container is not seen to provide any distinguishing function with respect to the size of the opening, but rather appears to relate to the size of the container per se. With respect to claim 12, it would have been obvious to make the opening line in either Tiefry or Deger with a downward convex shape as a mere arbitrary change in the shape or appearance of the opening line. No functional distinction is seen nor has any functional distinction been made by Applicant between the claimed opening line shape and that shown in each reference. Design patents are available to patent differences based solely on appearance.

6. Claims 1, 6, 7, 14 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tiefry as applied to claim 9 in paragraph 5 above, and further in view of Stone. Modified Tiefry evidences all structure of the claimed container except the provision of individual packages as contents within the container. Stone teaches that it is known to make a side dispensing container with packages as the contents. It would have been obvious to substitute packages for the bottles in Tiefry as taught by Stone as a mere selection of what content one wishes to store and dispense from the container. The selection of a desired content for a container is considered within the level of skill in this art.

7. Claims 1, 4-6, 14, 16, 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Deger as applied to claim 9 in paragraph 5 above, and further in view of

Art Unit: 3727

Stone. Modified Deger evidences all structure of the claimed container except the provision of individual packages as contents within the container. Stone teaches that it is known to make a side dispensing container with packages as the contents. It would have been obvious to substitute packages for the spaghetti in Deger as taught by Stone as a mere selection of what content one wishes to store and dispense from the container. The selection of a desired content for a container is considered within the level of skill in this art.

8. Claims 1, 2, 6, 7, 10, 14, 16 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tiefry as applied to claim 9 in paragraph 5 above, and further in view of Flood. Modified Tiefry evidences all structure of the claimed container except the provision of individual food packages as contents within the container. Flood teaches that it is known to make a side dispensing container with food packages as the contents. It would have been obvious to substitute food packages for the bottles in Tiefry as taught by Flood as a mere selection of what content one wishes to store and dispense from the container. The selection of a desired content for a container is considered within the level of skill in this art.

9. Claims 1, 2, 4-6, 10, 11, 14, 16 and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Deger as applied to claim 9 in paragraph 5 above, and further in view of Flood. Modified Deger evidences all structure of the claimed container except the provision of individual food packages as contents within the container. Flood teaches that it is known to make a side dispensing container with food packages as the contents. It would have been obvious to substitute food packages for the spaghetti in Deger as taught by Flood as a mere selection of what content one wishes to store and dispense from the container. The selection of a desired content for a container is considered within the level of skill in this art.

Art Unit: 3727

10. Claims 3 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claims 1 and 14 in any one of paragraphs 6-9 above. Modified Tiefry or Deger evidences all structure of the claimed container except an openable line with a downwardly convex shape. It would have been obvious to make the opening line in either Tiefry or Deger with a downward convex shape as a mere arbitrary change in the shape or appearance of the opening line. No functional distinction is seen nor has any functional distinction been made by Applicant between the claimed opening line shape and that shown in each reference. Design patents are available to patent differences based solely on appearance.

11. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 9 in paragraph 5 above, and further in view of either Lozaun or Hurray et al. Each of modified Tiefry and Deger evidences all structure of the claimed container except structures defining potential handle openings in opposing sides of the container. Each of Lozaun and Hurray et al teaches that it is known to make a box with potential opposing handle openings (28; 125, 126, respectively) to facilitate carrying the container. It would have been obvious to form opposing potential handle openings in the container in modified Tiefry or Deger as taught by either Lozaun or Hurray et al to facilitate carrying of the container. Handle openings in the sidewalls of boxes are well known in this art.

12. Claims 8 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claims 1 and 14 in any one of paragraphs 6-9 above, and further in view of either Lozaun or Hurray et al. Modified Tiefry or Deger evidences all structure of the claimed container except structures defining potential handle openings in opposing sides of the container. Each of Lozaun and Hurray et al teaches that it is known to make a box with potential opposing

Art Unit: 3727

handle openings (28; 125, 126, respectively) to facilitate carrying the container. It would have been obvious to form opposing potential handle openings in the container in either Tiefry or Deger as taught by either Lozaun or Hurray et al to facilitate carrying of the container. Handle openings in the sidewalls of boxes are well known in this art.

Response to Arguments

13. Applicant's arguments filed 27 December 2005 have been fully considered but they are not persuasive.

The remarks assert the opening in Deger is not of a size which would allow a person to put a hand into the container to remove a content within the container. In response, the size being claimed is a broad range of sizes insofar hands vary dramatically in size from very small to very large. Given the amount of spaghetti being shown as extending through the opening in fig. 1 of Deger, it is believed that the size is sufficient for a small hand (and the smaller wrist, if so desired) to be placed inside the container.

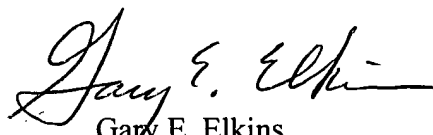
The remarks further assert the advantages of positioning the dispensing opening toward the bottom of the container and the apparent distinction with respect to the patent to Flood. In response, dispensing openings located near the bottom of containers are notoriously well known in this art, whether the contents are grasped and pulled out or dispensed by sliding the contents outwardly.

The remarks are otherwise moot in view of the new grounds of rejection.

Conclusion

14. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.


Gary E. Elkins
Primary Examiner
Art Unit 3727

gee
19 March 2006